U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

Date: JUN 18 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition approved.

The petitioner is an optometry practice that seeks to employ the beneficiary permanently in the United States as an optometrist. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had failed to submit evidence establishing that it had the continuing ability to pay the proffered wage to the beneficiary since the priority date and denied the petition accordingly.

As set forth in the director's denial issued on September 21, 2011, the primary issue to be considered in this case is whether or not the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on August 7, 2010. The proffered wage as stated on the ETA Form 9089 is $132,860.00 annually.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The record contains the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2010 and 2011, Forms W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to the beneficiary in 2010 and 2011, detailed summaries of wages paid to and hours worked by the beneficiary in 2010 and 2011, a statement from the petitioner's accountant, and a statement from the petitioner's owner and sole shareholder.

An examination of the evidence in the record establishes that the petitioner had the ability to pay the full proffered wage of $132,860.00 to the beneficiary in 2010 and 2011. Therefore, the AAO is persuaded that the petitioner has the continuing ability to pay the salary offered as of the priority date.

Although not noted by the director in the denial of the petition, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Part H. 14 of the ETA Form 9089 reflects that the proffered job requires a "License to practice Optometry in Vermont; Phd in Optometry." The record contains evidence reflecting that the beneficiary obtained a Doctor of Optometry degree from Indiana University in Bloomington, Indiana on May 10, 2003, and that she, since the priority date, has been and is currently licensed as an optometrist in the state of Vermont. Consequently, the AAO is satisfied that the beneficiary had the qualifications stated on the ETA Form 9089 since the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden with respect to both of the issues discussed above.

ORDER: The director's decision dated September 21, 2011 is withdrawn. The appeal is sustained, and the petition is approved.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).